IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 15, 2007 Session

JUDITH ANN FORD v. JAMES W. ROBERTS, ET AL.

Appeal from the Chancery Court for Hamilton County
No. 01-0846 Howell N. Peoples, Chancellor

No. E2007-00088-COA-R3-CV - FILED FEBRUARY 11, 2008

OPINION AND ORDER ON PETITION FOR REHEARING

The appellants have filed a petition for rehearing pursuant to the provisions of Tenn. R. App. P. 39. They initially argue that language in this court's opinion of December 20, 2007, is inconsistent with our assessment of the trial court record in our 2004 order denying the appellants' application for a Tenn. R. App. P. 10 extraordinary appeal.[1] That order indicated that the claim for an easement "by necessity . . . was withdrawn prior to trial." The appellants assert that this language reflects a determination by this court that the *statutory* claim for an easement pursuant to Tenn. Code Ann. § 54-14-101 (2004), *et seq.* had been withdrawn prior to the first trial.

As we construe our 2004 order, it simply recognized that the appellee apparently had withdrawn her claim for a *common law implied easement by necessity* -- not the statutory claim that was at issue in our 2007 opinion. Indeed, our 2004 order acknowledged the continued validity of the statutory claim by stating that the trial court's order "contained a provision granting [appellee's] right to condemn an easement pursuant to Title 54, Chapter 14 of T.C.A." Accordingly, we reject the appellants' suggestion that our 2007 opinion is inconsistent with our 2004 order. The appellants' first contention is found to be without merit.

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[1] In the order indicating that the criteria for a Rule 10 appeal had not been met and that the appeal was untimely, a panel of this court described the procedural status of the case at that time as follows:

> In this matter, Applicants James W. Roberts and wife Martha C. Roberts file an application for a Rule 10 extraordinary appeal, questioning the Trial Court's leave to Judith Ann Ford to amend a complaint previously filed which sought a right-of-way by prescription and/or by necessity. The latter assertion was withdrawn prior to trial. After trial, the Chancellor found that Ms. Ford had not carried her burden of proof relative to a prescriptive easement, but the order entered finding against her also contained a provision granting her right to condemn an easement pursuant to Title 54, Chapter 14 of T.C.A.

In their second argument, the appellants appear to be arguing that the trial court should have found that a common law implied easement of necessity across the land of her predecessors-in-title, the Ellisons, existed as a matter of law, and that the appellee was therefore not entitled to an easement across the appellants' land.

At a hearing on December 9, 2004, the trial judge found, *inter alia*, as follows:

> 1. The Plaintiff Judith Ford's property is landlocked.
>
> 2. That all of the adjoining landowners have refused to allow her a right-of-way across their property.
>
> 3. The existing right-of-way across the Roberts' property is the more feasible way for the Plaintiff to enter her property.
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> * * *

On March 9, 2006, with a new attorney in place, the appellants – the Roberts – argued the following in a motion to dismiss:

> Plaintiff has an implied easement of necessity and or an easement of necessity across the land of Bruce Ellison and Plaintiff has no right to seek ingress and egress to her Estate over the land of a stranger, specifically the land of the Defendants James and Martha Roberts; and
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> There is a reasonable way for Plaintiff to secure ingress and egress to a public roadway over the parcel of land of Bruce Ellison, from which parcel Plaintiff's estate was taken . . . .

(Paragraph numbering in original omitted). Appellants clearly asserted their position that appellee had an *implied easement of necessity* across the land of the Ellisons and, therefore, had no right to seek the easement across the Roberts land, which had previously been determined by the trial judge to be the most feasible of the available rights-of-way. The trial court, however, denied the motion, finding that the matter of the subject *implied easement of necessity* had been previously litigated. The trial court denied an oral motion by appellants for leave of court to take an immediate interlocutory appeal on that issue.

After the jury of view made its report on September 22, 2006, appellants initially filed an objection to the findings and demanded a new trial by a jury of twelve pursuant to Tenn. Code Ann. § 54-14-114. In their pleading, appellants raised numerous errors of the jury of view, specifically arguing "[t]hat the report of the jury of view is in error in that it awarded the Plaintiff an easement of convenience not an easement of necessity." When appellants obtained further new counsel, however, the new attorney requested that the pleading seeking a new trial be stricken. On November

30, 2006, the trial court entered an order confirming the request to strike. It also confirmed the jury of view's judgment.

In appellants' description of the record in their Tenn. R. App. P. 3 appeal and declaration of the issues to be presented, filed on December 14, 2006, the following issues were raised:

> 1. Whether the trial court erred by entering its Order of August 5, 2002 to the extent that the Order allowed Plaintiff to reserve an alternative cause of action under T.C.A. §54-14-101 et seq., to amend her complaint, and to proceed to a second trial pursuant to T.C.A. §54-14-101, after entering judgment against Plaintiff on her claim for a prescriptive easement following a trial on the merits.
>
> 2. Whether the trial court erred in allowing Plaintiff-Appellee a second trial on her claim pursuant to § 54-14-101 and entering its Order Confirming Verdict and Final Judgment on November 30, 2006.

(Underlining in original). Appellants now more specifically contend that the trial court, by its rulings, denied them the right to show the following: that appellee should have obtained an implied easement of necessity across the property of the party who conveyed the tract to her, instead of across the appellants' land; that it was prejudicial for the trial court to allow appellee to amend her complaint to add the conveying party for the purposes of statutory condemnation while denying appellants the right to assert that the statutory easement should have been taken over the land of the conveying party; and that the effect of the actions by the trial court was to withdraw from the jury of view consideration of any alternative easement other than the one sought over the lands of appellants.

Appellee in this matter apparently withdrew her claim for a common law implied easement by necessity and proceeded on the claim for a statutory remedy pursuant to Tenn. Code Ann. § 54-14-101, *et seq*. The statutory right relaxes the common law requirement of unity of title. ***Boone v. Frazor***, 1988 WL 77542, at *5 (Tenn. Ct. App. M.S., filed July 27, 1988). The provisions of Tenn. Code Ann. § 54-14-101, *et seq.* do not require that appellee must first pursue her claim for an easement over the land of her predecessors-in-title before the statutory avenue is available. In fact, the case law in this state provides that the statute does not withhold relief because a plaintiff has another outlet if that outlet is not adequate and convenient or would require some expense to develop. *See* ***Lay v. Pi Beta Phi, Inc.***, 207 S.W.2d 4, 6 (Tenn. Ct. App. 1947); ***Fite v. Gassaway***, 184 S.W.2d 564, 568 (Tenn. Ct. App. 1944); ***Brady v. Correll***, 97 S.W.2d 448, 450 (Tenn. Ct. App. 1936). However, in order to make out a claim under the statute, the landlocked property owner still must show that the requested right-of-way is necessary and not merely a matter of convenience. ***Vinson v. Nashville C. & St. L. Ry.***, 321 S.W.2d 841, 843 (Tenn. Ct. App. 1958). We presume that the trial court made such findings when it held that "[t]he existing right-of-way across the Roberts' property is the more feasible way for the Plaintiff to enter her property."

Tenn. Code Ann. § 54-14-111 allows the jury of view to locate the easement "at the place set out in the petition or at any other place," *e.g.*, potentially on the property of the predecessors-in-title. *See* ***Barge v. Sadler***, 70 S.W.3d 683, 690 (Tenn. 2002). The jury of view "must therefore be allowed to consider all of the surrounding property." ***Id.*** (citing ***Clouse v. Garfinkle***, 231 S.W.2d 345, 348 (Tenn. 1950)).[2] In an order filed April 10, 2006, the trial court ruled, *inter alia*, as follows:

> The parties are Ordered to bring into the instant matter the additional parties required to resolve the matter; and
>
> The date for the jury of view to view the property and to determine the proper way of Plaintiff Judith Ford for ingress and egress to her property is continued . . . .

(Paragraph numbering in original omitted). Clearly, the trial court provided that the jury of view had the option of locating the easement across the land of the predecessors-in-title. The jury of view chose not to pursue this option. If appellants were unhappy with the determination of the jury of view, they could have maintained an appeal of its findings pursuant to the statute. *See* Tenn. Code Ann. § 54-14-114; ***Pound v. Fowler***, 133 S.W.2d 486, 488 (Tenn. 1939) (proper objections to the report of the jury of view concern assertions that the report is founded upon erroneous principles).

In view of the fact the appellants have asserted since their 2001 answer to the original complaint that "the shortest, least intrusive, and most convenient right of way from [Plaintiff's] property to a public road, to wit, Birchwood Pike, is through the lands of [Plaintiff's] predecessors-in-title," we find that appellants' position was clearly presented to the trial court. Accordingly, we find no prejudice to them resulting from any of the trial court's rulings. The appellants have cited no authority requiring the trial court to first consider the common law implied easement of necessity before proceeding to a consideration of the statutory scheme. Furthermore, we have found no such authority. Therefore, we find no error in the manner in which the trial court proceeded in this case pursuant to Tenn. Code Ann. § 54-14-101, *et seq*.[3]

The petition for rehearing is denied with costs associated with the petition taxed to the appellants, James W. Roberts and Martha C. Roberts.

IT IS SO ORDERED.

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[2]As noted in ***Barge***, only those who are actually made parties may have their property interests affected by the condemnation proceedings. Should the report from the jury of view locate the easement on the land of a non-party, the report must be set aside and another jury of view appointed for reconsideration of the petition after that landowner and all other interested parties have been joined. 70 S.W.3d at 690.

[3]Implied easements are not looked upon with favor and the policy of the law is to restrict the doctrine of implied easements. ***Cole v. Dych***, 535 S.W.2d 315, 318 (Tenn. 1976), ***Lively v. Noe***, 460 S.W.2d 852, 854 (Tenn. Ct. App. 1970). *See also* ***Bunch v. Hodel***, 793 F.2d 129, 134 (6th Cir. 1986).

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CHARLES D. SUSANO, JR., JUDGE

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HERSCHEL P. FRANKS, PRESIDING JUDGE

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SHARON G. LEE, JUDGE